

Dated: October 25, 2019



Daniel P. Collins

Daniel P. Collins, Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

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|--------------------------------|---|----------------------------------|
| In re: |) | Chapter 11 Proceedings |
| |) | |
| POTENTIAL DYNAMIX, LLC, |) | Case No.: 2:11-bk-28944-DPC |
| |) | |
| Debtor. |) | Adversary No.: 2:13-ap-00799-DPC |
| |) | |
| _____ |) | |
| TIMOTHY H. SHAFFER, Chapter 11 |) | UNDER ADVISEMENT ORDER |
| Trustee, |) | REGARDING DISCOVERY |
| |) | DISPUTES |
| Plaintiff, |) | |
| |) | [NOT FOR PUBLICATION] |
| v. |) | |
| |) | |
| AMAZON SERVICES LLC, |) | |
| |) | |
| Defendant. |) | |

Before this Court is the Motion¹ (the “Expert Discovery Motion”) of Defendant Amazon Services LLC (“Defendant” or “Amazon”) to compel discovery from Plaintiff, Timothy H. Shaffer, Chapter 11 Trustee (“Plaintiff”) as well as Plaintiff’s request² to reset a hearing on his April 10, 2015 Motion³ to Compel Production of Documents Claimed to be Privileged (the “Gibson Motion”). The Court now partially grants Defendant’s Expert Discovery Motion and denies Plaintiff’s Gibson Motion.

I. JURISDICTION

This Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (E) and (O) and 1334 and Bankruptcy Rule 7026.

¹ Docket Entry 195. All docket entries (“DE”) mentioned in this Order reference the docket in this adversary proceeding (“Adversary Proceeding”), unless otherwise noted.

² DE 197.

³ DE 48.

1 **II. BACKGROUND**

2 Potential Dynamix, LLC (“Debtor”) filed its voluntary chapter 11 bankruptcy on
3 October 13, 2011. Debtor has never confirmed a chapter 11 plan in this case. Plaintiff was
4 appointed Debtor’s chapter 11 trustee on January 27, 2012.⁴ Debtor was allegedly, at one time,
5 Defendant’s largest volume customer. Debtor listed up to 30,000 products for sale on Defendant’s
6 internet-based platform.⁵ On April 12, 2013, Defendant terminated Debtor’s ability to sell
7 products on Defendant’s platform.⁶ Since Defendant’s platform was the principal (if not only)
8 place where Debtor sold its products, upon Defendant’s termination of Debtor’s access to
9 Defendant’s platform, Debtor was instantly out of business. Debtor contested Defendant’s right
10 to deny Debtor’s access to Defendant’s internet platform. On September 18, 2013,⁷ this Court
11 entered its order, among other things, confirming Defendant’s right to terminate its agreements
12 with Debtor.

13 On July 9, 2013, Trustee brought this Adversary Proceeding initially alleging \$1.5 million
14 in damages resulting from lost inventory and withheld sales revenue. On May 10, 2019, Trustee
15 disclosed an expert report (“Morones Report”) authored by Serena Morones (“Morones”). The
16 Morones Report attempts to analyze data related to Debtor’s and Defendant’s transactional
17 history between January 1, 2008 and January 31, 2014. Debtor contends that over 6.3 million
18 transactions occurred involving Debtor and its inventory placed in Defendant’s hands.⁸ It is this
19 transactional history between the parties that is the focus of the discovery disputes before this
20 Court.

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22 **A. The Gibson Motion**

23 In the Gibson Motion, Plaintiff asks that this Court compel Defendant to turnover
24 Defendant’s internal communications that reflect the basis for Defendant’s termination of its
25 contracts with Debtor. The Gibson Motion was initially heard by this Court on July 8, 2015, but

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⁴ Administrative DE 110.

⁵ Debtor’s Disclosure Statement at Administrative DE 219, page 5.

⁶ Administrative DE 243, p. 1, l. 22

⁷ Administrative DE 364.

⁸ DE 210, p. 14.

1 was tabled because the Gibson Motion was not accompanied by the “meet and confer” certificate
2 required by former Local Rule 9013-1(e). Plaintiff now seeks to reset a hearing on the Gibson
3 Motion. Plaintiff attached a LR 9013-1 certificate with his motion to reset the Gibson Motion for
4 hearing. Defendant claims Plaintiff withdrew the Gibson Motion, that Plaintiff is not entitled to
5 the privileged documents sought and, in any event, the discovery sought is moot because this
6 Court already found that Defendant properly terminated its contracts with Debtor.

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8 **B. The Expert Discovery Motion**

9 In the Expert Discovery Motion, Defendant seeks Plaintiff’s production of all information
10 that Morones considered in the preparation of the Morones Report. The Expert Discovery Motion
11 is the culmination of a series of discovery disputes and hearings held by this Court over this past
12 summer. Defendant cites this Court to Bankruptcy Rule 7026 as well as Defendant’s 2017 and
13 2019 written discovery to Plaintiff and its 2019 subpoenas of Morones and Jeffrey A. Cone
14 (“Cone”). Plaintiff counters Defendant’s Expert Discovery Motion by once again noting all of
15 what Defendant is entitled to receive under Bankruptcy Rule 7026 will be produced. Plaintiff has
16 not committed to a date by which this production will take place. Plaintiff also contends
17 Defendant’s 2019 written discovery requests and the 2019 subpoenas of Morones and Cone are
18 barred by this Court’s stipulated scheduling order. Plaintiff complains about the costs and time
19 expenditure that will be incurred in responding to Plaintiff’s discovery requests.

20 A number of the issues pertaining to the Expert Discovery Motion were resolved at this
21 Court’s October 17, 2019 hearing.⁹ What was not resolved on October 17, 2019, were
22 (1) Defendant’s discovery demands pertaining to information considered by Morones in the
23 preparation of her report, beyond the information supplied to her by Mr. Ashworth, (2) the Bates
24 stamping of Plaintiff’s discovery productions, (3) the costs of production as well as the fees and
25 costs incurred by the parties in these discovery disputes, (4) what to do about Defendant’s 2017
26 and 2019 written discovery, and (5) the 2019 subpoenas of Morones and Cone.

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⁹ See this Court’s October 23, 2019 minute entry at DE 215.

1 **III. FINDINGS**

2 **A. The Gibson Motion**

3 The Gibson Motion¹⁰ was filed on April 10, 2015. Defendant responded¹¹ and Plaintiff
4 replied.¹² This Court heard the matter on July 8, 2015, but did not address the substance of the
5 parties' arguments because Plaintiff failed to file the certificate required by former LR 9013-1.
6 Nothing happened with the Gibson Motion for the next four years. Finally, on September 9, 2019,
7 Plaintiff filed his request¹³ to reset the Gibson Motion for hearing. That request was accompanied
8 by Plaintiff's counsel's LR 9013-1 certificate.

9 The Court is baffled by the extraordinary delay in Plaintiff re-urging resolution of the
10 Gibson Motion. Plaintiff's recent filings do not explain why it took so long for Plaintiff to again
11 address this issue. Nor does Plaintiff explain why he contends the Defendant waived the privilege
12 relative to the discovery sought by Plaintiff. What Plaintiff's response¹⁴ to Defendant's
13 opposition¹⁵ does clear up is that Plaintiff is only looking for a single document which is an email
14 thread identified in Exhibit A to the Gibson Motion.

15 This Court now finds that, while Plaintiff did not waive or withdraw the Gibson Motion,
16 Defendant has not waived the privilege which was properly asserted by Defendant relative to this
17 internal Amazon communication involving Defendant's internal counsel, Gibson. This single
18 document is covered by the attorney-client privilege. More importantly, to the extent this single
19 document might shed light on what motivated Defendant to terminate its contract with Debtor,
20 this issue is no longer pertinent to this Adversary Proceeding because this Court has already
21 determined Defendant's termination of its contracts with the Debtor was properly accomplished.
22 In other words, the Gibson Motion is moot.

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¹⁰ DE 48.

¹¹ DE 65.

¹² DE 79.

¹³ DE 197.

¹⁴ DE 211

¹⁵ DE 200.

1 **B. The Expert Discovery Motion**

2 Plaintiff ably identifies the seven general categories of issues subsumed within
3 Defendant's Expert Discovery Motion:

- 4 1. Failure to provide documents with the Morones Report;
5 2. Amazon's Third Document Request of the Trustee;
6 3. Scope of Amazon's subpoenas and document request to Morones;
7 4. The cost associated with the production;
8 5. The Cone Software Program;
9 6. Prior production of Amazon data and QuickBooks; and
10 7. Deposition of Matthew Schmidt.¹⁶

11 This Court's oral ruling on October 17, 2019 (memorialized by the Court's minute entry order
12 dated October 23, 2019¹⁷) resolved issue #s 5, 6 and 7, and partially resolved issue # 1
13 (Mr. Ashworth's transmissions to Morones must be produced by Plaintiff to Defendant no later
14 than October 25, 2019). The Court now addresses the balance of issue # 1 as well as issue #s 2,
15 3 and 4.

16 Rule 26(a)(2)(B) states:

17 (2) Disclosure of Expert Testimony.

18 (A) In General. In addition to the disclosures required by
19 Rule 26(a)(1), a party must disclose to the other parties the identity
20 of any witness it may use at trial to present evidence under Federal
21 Rule of Evidence 702, 703, or 705.

22 (B) Witnesses Who Must Provide a Written Report. Unless
23 otherwise stipulated or ordered by the court, this disclosure must
24 be accompanied by a written report—prepared and signed by the
25 witness—if the witness is one retained or specially employed to
26 provide expert testimony in the case or one whose duties as the
27 party's employee regularly involve giving expert testimony. The
28 report must contain:

- (i) a complete statement of all opinions the witness will express and
 the basis and reasons for them;
 (ii) the facts or data considered by the witness in forming them;
 (iii) any exhibits that will be used to summarize or support them;
 (iv) the witness's qualifications, including a list of all publications
 authored in the previous 10 years;

¹⁶ DE 210, p. 3, l. 26 through p. 4, l. 7.

¹⁷ DE 215.

1 (v) a list of all other cases in which, during the previous 4 years,
2 the witness testified as an expert at trial or by deposition; and
3 (vi) a statement of the compensation to be paid for the study and
4 testimony in the case.

5 Plaintiff acknowledges he has not yet produced to Defendant all of the documentation
6 required by this Rule. The Court already required Plaintiff to supply to Defendant, no later than
7 October 25, 2019, all information transmitted to Morones by Mr. Ashworth. Now the Court
8 orders Plaintiff to provide to Defendant by November 30, 2019, (1) all information transmitted to
9 Morones by Cone in connection with her work in this Adversary Proceeding; (2) all
10 communication and transmissions to and from Morones concerning her expert engagement in this
11 Adversary Proceeding; and (3) everything Morones considered in connection with preparation of
12 her expert report in this Adversary Proceeding. All of these documents must be Bates stamped.
13 Plaintiff shall bear the costs of these document productions and the Bates stamping. However, to
14 the extent the Morones Report considered electronic inventory records and transactional records
15 generated by Amazon, that information may simply be identified by Plaintiff by one document
16 number and one title and the date it was delivered to Morones by Debtor and/or Plaintiff.

17 As to Defendant's third document request, that is written document requests issued by
18 Defendant in 2019, the Court hereby quashes such requests. The Court views these requests as
19 largely duplicative of Defendant's 2017 written discovery requests. Those 2017 requests,
20 however, must be answered by Plaintiff no later than November 30, 2019. Documents produced
21 pursuant to these 2017 discovery requests must be Bates stamped at Plaintiff's expense, except to
22 the extent noted in the immediately proceeding paragraph of this Order.

23 As to Defendant's 2019 subpoenas to Morones and Cone, those subpoenas are hereby
24 quashed. The parties are directed to cooperatively work on dates for Defendant to depose
25 Morones, Cone and/or Ashworth no sooner than 30 days after Plaintiff complies with the
26 document production components of this Order but, in any event, no later than February 28, 2020.

27 To the extent Plaintiff seeks fees and/or costs in connection with the discovery issues
28 addressed in this Order or the Court's October 23, 2019 minute order, such requests are denied.

Plaintiff is largely responsible for the failure to produce discovery requested by Defendant and

1 will not now be rewarded for such failures. To the extent Defendant seeks an award of fees or
2 costs in connection with the discovery issues addressed in this Order or the Court's October 23,
3 2019 minute order, the Court hereby orders that such issues shall abide the final disposition of
4 this Adversary Proceeding.

5 In responding to Defendant's 2017 discovery requests, should Plaintiff believe those
6 requests are overly broad or opaque, Plaintiff may find it useful to be guided by the greater
7 discovery specificity supplied in Defendant's 2019 discovery requests. In the event Plaintiff
8 believes Defendant's 2017 discovery requests impermissibly seek privileged documents or other
9 information, Plaintiff must provide Defendant a written privilege log in accordance with Rule
10 26(b)(5) no later than November 30, 2019. Should Plaintiff fail to timely and fully respond to
11 Defendant's 2017 discovery requests and/or fail to comply with this Order or the Court's October
12 23, 2019 minute order, the Court will entertain a written motion by Defendant seeking to bar
13 admission of the Morones Report.

14 Finally, this Court is mindful that the parties in this Adversary Proceeding have repeatedly
15 violated orders of this Court and have disregarded the Local Rules of the U.S. Bankruptcy Court
16 for the District of Arizona. To the extent pleadings filed hereafter by the parties exceed the page
17 limits set forth in Local Rule 9013-1, the Court shall ignore all material in excess of the page
18 limitations. To the extent pleadings are filed untimely, they shall be stricken from the record. To
19 the extent the parties fail to adhere to the scheduling order currently in effect (or as hereafter
20 modified), this Court shall entertain a written motion from the non-offending party seeking an
21 appropriate sanction against the offending party. Should any party seek relief from any deadlines
22 imposed by this Court or by the Bankruptcy Rules or Local Rules, the Court will consider such
23 relief only if such request is reduced to writing and filed with this Court prior to the expiration of
24 the deadline in question.

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26 **IV. CONCLUSION**

27 Based on the foregoing, the Court hereby denies the Gibson Motion and hereby partially
28 grants the Expert Discovery Motion.

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IT IS HEREBY ORDERED setting a status hearing for this Adversary Proceeding on **December 11, 2019, at 11:00 a.m.**, at which time the Court will (1) inquire into the status of compliance with this Order and the October 23, 2019 minute order, (2) discuss the schedule governing this Adversary Proceeding and any appropriate or requested changes to the schedule, and (3) entertain any other business concerning this Adversary Proceeding.

DATED AND SIGNED ABOVE.